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No. 01- 01-737

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

SECURITY LIFE INSURANCE COMPANY OF AMERICA and CONGRESS LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

REID A. EVERS
STEVEN D. WEINBERG*
TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY LAW DEPARTMENT
Attorneys for Petitioner
1150 South Olive, 21st Floor
Los Angeles, California 90015
(213) 742-3595

* *Counsel of Record*

170682

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

45pp

QUESTIONS PRESENTED

Whether in an arbitration proceeding subject to the Federal Arbitration Act a person can only be compelled to appear as a witness and bring documents before one or more of the arbitrators.

Whether the Federal Rules of Civil Procedure, in general, apply to arbitration proceedings subject to the Federal Arbitration Act.

Whether Rule 45 of the Federal Rules of Civil Procedure, specifically, applies to arbitration proceedings subject to the Federal Arbitration Act.

Whether a person is entitled to a trial within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure before the person can be held in contempt for failure to comply with a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure.

Whether a person is deprived of the due process of law to which the person is entitled pursuant to the Fifth Amendment by being held in contempt for failure to comply with a subpoena for documents issued pursuant to Rule 45 of the Federal Rules of Civil Procedure when the person has objected to such document production as provided in Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure and when the district court from which the subpoena was issued had not issued an order compelling such document production.

Whether a person who is not a party to a civil action is deprived of the due process of law to which the person is entitled pursuant to the Fifth Amendment by being held in contempt for failure to comply with a subpoena to provide testimony and produce documents issued pursuant to Rule

45 of the Federal Rules of Civil Procedure when the subpoena requires the person to testify and produce documents at a place not within the territorial limits set forth in Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure.

Whether a contempt citation is the only sanction available against a nonparty witness to a civil action for failure to comply with a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure and, therefore, whether monetary sanctions may not be awarded against such nonparty witness.

PARTIES TO THE PROCEEDING

The parties to the underlying arbitration proceeding to which this matter relates are purportedly Security Life Insurance Company of America and Congress Life Insurance Company, as Petitioners, and Duncanson & Holt, Inc. and the Multiple Employers Trust Quota Share Line Slip, as Respondents. In relation to that arbitration proceeding, Security Life Insurance Company of America and Congress Life Insurance Company brought a proceeding in the United States District Court for the Central District of California for an order to show cause why a contempt citation should not issue against Transamerica Occidental Life Insurance Company for failure to comply with a subpoena issued by that district court.

Transamerica Occidental Life Insurance Company is wholly owned by Transamerica Corporation. Transamerica Corporation is wholly owned by AEGON N.V., a publicly traded company.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit. With the increasing use of alternative dispute resolution and the corresponding increase in the number of arbitration proceedings subject to the Federal Arbitration Act, it is essential that both nonparties and parties to those arbitration proceedings know the extent and limits of the subpoena power that is available in such arbitration proceedings. This Court, therefore, should grant this Petition and address the important questions of law presented by this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A) is reported at 2001 U.S. App. LEXIS 10935. The opinion of the United States District Court for the Central District of California (App. B) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 23, 2001. The United States Court of Appeals for the Ninth Circuit denied a timely petition for rehearing (App. C) on August 20, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, is as follows:

> § 7. Witnesses before arbitrators; fees; compelling attendance
>
> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Rule 1 of the Federal Rules of Civil Procedure is as follows:

Rule 1. Scope and Purpose of Rules

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 43 of the Federal Rules of Civil Procedure provides in relevant part as follows:

Rule 43. Taking of Testimony

> (a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.
>
> . . .
>
> (e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Rule 45 of the Federal Rules of Civil Procedure provides in relevant part as follows:

Rule 45. Subpoena

. . .

(c) Protection of Persons Subject to Subpoenas.

. . .

(2) .. .

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

. . .

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

. . .

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Rule 81(a)(3) of the Federal Rules of Civil Procedure is as follows:

Rule 81. Applicability in General

(a) To What Proceedings Applicable

. . .

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not

provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

STATEMENT OF THE CASE

In an arbitration proceeding in which Respondents Security Life Insurance Company of America ("Security Life") and Congress Life Insurance Company ("Congress Life") were parties, the umpire of the arbitration panel issued a subpoena on April 27, 1999, ("umpire's subpoena") commanding Petitioner Transamerica Occidental Life Insurance Company ("Transamerica") to produce documents and a witness at a deposition in California where none of the arbitrators would be in attendance. Transamerica declined to comply with the umpire's subpoena.

Security Life and Congress Life filed a petition in the United States District Court for the District of Minnesota seeking to compel Transamerica's compliance with the umpire's subpoena. The United States District Court for the District of Minnesota directed counsel for Security Life and Congress Life to issue a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure commanding Transamerica to produce documents and provide testimony at a deposition where none of the arbitrators would be in attendance.

Rather than do as directed by the United States District Court for the District of Minnesota, instead, on July 13, 1999, counsel for Security Life and Congress Life had the Clerk of the United States District Court for the Central District of California issue a subpoena commanding Transamerica to

produce documents and provide testimony at a deposition where none of the arbitrators would be in attendance ("district court's subpoena"). Transamerica was served with the district court's subpoena on July 16, 1999. On July 19, 1999, Transamerica served Security Life and Congress Life with written objections to the production of documents that were within the scope of the district court's subpoena. Transamerica declined to produce a witness to testify as commanded by the district court's subpoena.

On August 27, 1999, Security Life and Congress Life brought a proceeding in the district court for an order to show cause why a contempt citation should not issue against Transamerica for failure to comply with the district court's subpoena. A hearing was held in the district court on September 10, 1999. By order entered on September 15, 1999, the district court held Transamerica in contempt of court for failure to comply with the district court's subpoena and ordered Transamerica to pay Security Life $10,000 in attorney's fees and $503.35 in costs. On October 15, 1999, Transamerica appealed the district court's order to the United States Court of Appeals for the Ninth Circuit.

On May 23, 2001, the court of appeals affirmed the district court's order. On June 6, 2001, Transamerica petitioned the court of appeals for a rehearing. On August 20, 2001, the court of appeals denied Transamerica's petition for a rehearing.

REASONS FOR GRANTING THE WRIT

I. THE EFFECT OF THE NINTH CIRCUIT'S OPINION IS THAT RULE 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLIED TO AN ARBITRATION PROCEEDING SUBJECT TO THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-307, CONTRARY TO THE EXPLICIT PROVISIONS OF RULE 81(a)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE, CONTRARY TO THE EXPLICIT PROVISIONS OF SECTION 7 OF THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 7, AND IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure apply to proceedings in the United States district courts, with the exceptions stated in Rule 81 of the Federal Rules of Civil Procedure. Rule 81(a)(3) of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure apply to proceedings under the Federal Arbitration Act "only to the extent that matters of procedure are not provided for in" the Federal Arbitration Act.

Although Rule 81(a)(3) of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure apply to proceedings in a district court under the Federal Arbitration Act, 9 U.S.C. §§ 1-307, the Federal Rules of Civil Procedure do not apply to arbitration proceedings themselves.

> According to Federal Rule 81(a)(3), the Federal Rules of Civil Procedure apply to proceedings under the Federal Arbitration Act and proceedings to contest an arbitration of a railway labor dispute, "only to the extent that matters of procedure are not provided for in those statutes." *It is only the judicial*

> *proceedings under the Arbitration Act* or the act governing contests over railway labor arbitrations that are subject to the rules. *The federal rules do not govern the procedure in the hearings before the arbitrators*, which, by agreement of the parties, normally is regulated by the American Arbitration Association's Commercial Arbitration Rules.

4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1015 (2d ed. 1987) (emphasis added) (footnotes omitted), citing, in part, *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9 (E.D. Pa. 1960) wherein the court delineated the judicial proceedings under the Federal Arbitration Act to which the Federal Rules of Civil Procedure apply by virtue of Rule 81(a)(3) of the Federal Rules of Civil Procedure:

> The [Federal Arbitration] Act itself provides only for a stay of a suit brought in any court of the United States upon any issue referable to arbitration, Section 3; compelling arbitration, Section 4; appointment by the court of arbitrators or umpire, Section 5; vacation, Section 10; and modification or correction of arbitration award, Section 11. From the foregoing it is clearly evident that the Arbitration Act itself does not in any wise attempt to regulate the procedures before the arbitrators or prescribe rules or regulations with respect to hearings before arbitrators.

Id. at 11. *See also Deiulemar Compagnia Di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 483 (4th Cir. 1999) ("Rule 81 does not apply to an underlying arbitration proceeding. Rather, it applies only to allow or prohibit use of the federal rules in [Federal Arbitration Act] proceedings."); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) ("Rule 81(a)(3) only applies to judicial

proceedings under the [Federal Arbitration Act]."); *Government of the United Kingdom of Great Britain and Northern Ireland v. Boeing Co.*, 998 F.2d 68, 73 (2d Cir. 1993):

> Rule 81(a)(3) merely allows the application of the Federal Rules of Civil Procedure to judicial proceedings that are before a court pursuant to U.S.C. Title 9, to the extent that Title 9 does not provide appropriate procedural rules. Rule 81(a)(3) clearly does not import the Federal Rules of Civil Procedure to the private arbitration proceedings that underlie the Title 9 proceedings pending before a court.

Commercial Solvents Corp. v. La. Liquid Fertilizer Co., 20 F.R.D. 359, 360-361 (S.D.N.Y. 1957):

> It is argued that since the Federal Arbitration Act, Title 9 U.S.C.A. § 1 et seq., does not provide a procedure for depositions and discovery, Rule 81(a)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. fills the void and authorizes application of the federal discovery rules ... Rule 81(a)(3), it is to be noted, authorizes the application of the Federal Rules "* * * in proceedings under Title 9, U.S.C., * * *". By its attempted invocation of that Rule under the present circumstances, respondent has failed to note the distinction between "matters of procedure" and "proceedings" as those terms are employed in the Rule. Application of the federal rules in proceedings under the Federal Arbitration Act to supply "matters of procedure" not provided for therein, is authorized. Rule 81(a)(3) comes into play, however, only in proceedings under the Act.

(footnote omitted); *Penn Tanker Co. of Del. v. C.H.Z. Rolimpex*, 199 F. Supp. 716, 718 (S.D.N.Y. 1961) ("But I do

not think that Rule 81(a)(3) is designed to allow judicially imposed and controlled discovery as to the merits of a controversy which will be referred to arbitration. . . .").

It is important to note that the failure of the court of appeals to distinguish between the judicial proceedings under the Federal Arbitration Act and arbitration proceedings subject to the Federal Arbitration Act, as required by Rule 81(a)(3) of the Federal Rules of Civil Procedure, is contrary to Ninth Circuit precedent. In addressing the question of whether the Federal Rules of Civil Procedure applied to an agency proceeding, as opposed to a court proceeding to enforce the agency's summons, the court of appeals has stated the following:

> Rule 81(a)(3) provides that the Federal Rules of Civil Procedure apply "to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States * * *." It was held in *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 280 F.2d 654 (1960), that because of this provision of Rule 81(a)(3) the limitations found in Rules 30(b) and 45(b) and (d) are directly applicable to administrative subpoenas. This result, however, fails "to observe the important distinction between the administrative proceeding * * * and the court action to enforce the summons * * * Rule 81(a)(3) makes the Rules of Civil Procedure applicable * * * to the court action to enforce the summons * * *. To contend that the proceeding itself before the Commissioner * * * is also a civil case subject to the Rules of Civil Procedure * * * would be going too far." *Falsone v. United States*, 205 F.2d 734, 742 (5th Cir. 1953).

FCC v. Schreiber, 329 F.2d 517, 534 n.23 (9th Cir. 1964), *modified*, 381 U.S. 279 (1965). The distinction made by the

court of appeals in *Schreiber* between an agency proceeding and a court proceeding to enforce the agency's summons as provided by Rule 81(a)(3) of the Federal Rules of Civil Procedure is precisely the distinction provided by Rule 81(a)(3) of the Federal Rules of Civil Procedure between judicial proceedings under the Federal Arbitration Act and arbitration proceedings subject to the Federal Arbitration Act.

Moreover, the Federal Arbitration Act specifically provides a procedure for summoning persons to produce documents and to provide testimony in an arbitration proceeding, *i.e.*, section 7 of the Federal Arbitration Act, 9 U.S.C. § 7. Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, states, in part, as follows:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person *to attend before them or any of them* as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

9 U.S.C. § 7 (emphasis added). Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, therefore, provides that arbitrators, not a district court and not an attorney admitted to appear before a district court, summon persons to produce documents and to provide testimony.

Since the Federal Arbitration Act specifically provides for the manner in which persons may be summoned to produce documents and to provide testimony in such proceedings, i.e., section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, then pursuant to Rule 81(a)(3) of the Federal Rules of Civil Procedure, the provisions of the Federal Rules of Civil Procedure which deal with the manner in which persons may be summoned to produce documents and to

provide testimony would not apply to such arbitration proceedings. Therefore, Rule 45 of the Federal Rules of Civil Procedure would specifically not apply to such arbitration proceedings even if the Federal Rules of Civil Procedure, in general, did apply to arbitration proceedings subject to the Federal Rules of Civil Procedure.

Moreover, section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, provides that arbitrators may only compel a person to appear to testify or produce documents before one or more of the arbitrators. Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, does not permit arbitrators to compel any person to testify or produce documents at a deposition where none of the arbitrators will be in attendance. The enforcement provisions contained in section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, confirm that a nonparty to an arbitration proceeding subject to the Federal Arbitration Act can not be compelled to appear and testify at a deposition where none of the arbitrators will be in attendance. With respect to a person summoned to testify or produce documents in an arbitration proceeding subject to the Federal Arbitration Act, but who does not appear as summoned, section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, provides, in part, as follows:

> [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrator, or a majority of them, are sitting *may compel the attendance of such person or persons before said arbitrator or arbitrators. . . .*

9 U.S.C. § 7 (emphasis added). Therefore, pursuant to section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, a district court can only compel a nonparty to an arbitration to appear to

testify before one or more of the arbitrators. Accordingly, it was contrary to the explicit provisions of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, for the district court to hold Transamerica, a nonparty to the arbitration proceeding in question, in contempt for not having appeared at a deposition where none of the arbitrators were in attendance.

It should be noted that when Congress has wanted Rule 45 of the Federal Rules of Civil Procedure to apply to arbitration proceedings, it has explicitly so provided. In the Alternative Dispute Resolution Act of 1988, 28 U.S.C. §§ 651-658, Congress explicitly provided as follows:

> Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

28 U.S.C. § 656. Had Congress wanted Rule 45 of the Federal Rules of Civil Procedure to apply to arbitration proceedings subject to the Federal Arbitration Act, it could have so provided in the Federal Arbitration Act. Instead, the only subpoenas authorized by Congress in the Federal Arbitration Act are subpoenas issued by arbitrators as provided by Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7.

The scope of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, was analyzed by the United States Court of Appeals for the Fourth Circuit in *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999). In *Comsat*, the Court of Appeals for the Fourth Circuit was dealing with a case in which a district court had "read the FAA [the Federal Arbitration Act] as a broad grant of full subpoena power to arbitrators." *Id.* at 274. With respect to the subpoena powers of arbitrators, the Court of Appeals for the Fourth Circuit stated the following:

The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. The statute provides, in pertinent part:

> arbitrators ... may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material....

9 U.S.C.A. § 7.

Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing. *See id.*

In disregard of the plain language of the statute, COMSAT cites a provision of the FAA that permits a federal district court to enforce an arbitrator's subpoena, *see* 9 U.S.C.A. § 7, seemingly for the proposition that an arbitrator's subpoena authority is coextensive with that of a federal court. This is decidedly not the case. The FAA provides that a federal court may "compel the *attendance* of [a subpoenaed person] *before said arbitrator*...." 9 U.S.C.A. § 7 (emphasis added). The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal.

> Furthermore, once subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena. By failing to do so, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel. The FAA imposes no requirement that a subpoenaed party file a petition to quash or otherwise challenge the subpoena; the Act's only mechanism for obtaining federal court review is the petition to compel. *See* 9 U.S.C.A. § 7 ("[U]pon petition the ... district court ... may compel the attendance of such person.").
>
> The rationale for constraining an arbitrator's subpoena power is clear. Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. *See Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."). A hallmark of arbitration — and a necessary precursor to its efficient operation — is a limited discovery process. *See id.* at 391 (concluding that limitations on discovery promote the "policy underpinnings of arbitration [which are] speed, efficiency, and reduction of litigation expenses."). Consequently, because COMSAT and AUI have elected to enter arbitration, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.

Comsat, 190 F.3d at 275-276 (footnote omitted).

By having affirmed the district court's order holding Transamerica in contempt for having failed to comply with the district court's subpoena, the Ninth Circuit's opinion conflicts with the views expressed in *Comsat* by the Fourth Circuit as to the scope of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7. Moreover, other courts have also held that arbitrators may not, pursuant to section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, issue a subpoena compelling a nonparty to an arbitration proceeding to appear at a deposition. *See, e.g., Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71-73 (S.D.N.Y. 1995).

II. THE NINTH CIRCUIT'S OPINION DEPRIVES PETITIONER OF DUE PROCESS OF LAW.

The court of appeals cites *United States v. Ayers*, 166 F.3d 991, 995 (9th Cir. 1999), as the basis for rejecting Transamerica's argument that Transamerica was entitled to a trial within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure before Transamerica could be held in contempt for not having complied with the district court's subpoena. In *Ayers*, the Internal Revenue Service ("IRS") had issued a summons to which Mr. Ayers never responded. The IRS then filed a petition in the district court seeking enforcement of the summons. The district court issued a summons enforcement order. Unlike an order to comply with a district court subpoena, an order enforcing an IRS summons is a final appealable order. Mr. Ayers, however, never appealed the district court's summons enforcement order.

The cases cited in *Ayers* address whether a *party* to a civil action is entitled to a "full-blown evidentiary hearing" prior to a district court's entry of a contempt order. *Ayers*, 166 F.3d at 995-996. Transamerica was never a party to any civil action in the United States District Court for the Central District of California, the district court from which the subpoena in question in this appeal was issued. Transamerica

was never a party to any civil action in the United States District Court for the District of Minnesota, the district in which an arbitration proceeding was pending, and Transamerica was not a party to that arbitration proceeding. Accordingly, the cases cited in *Ayers* are no basis for affirming the district court's contempt order in this case.

Moreover, the court of appeals in *Ayers* stated that a "full-blown evidentiary hearing" is not required *if* the facts are uncontroverted. *Ayers*, 166 F. 3d at 995-996. In this case there are a number of controverted facts which the district court refused to consider. By way of examples, and not by way of limitation, the following material facts were in dispute:

(1) whether the documents and testimony sought by Security Life and Congress Life were material and relevant to the arbitration proceeding in question;

(2) whether Security Life and Congress Life had to obtain documents from Transamerica or whether such documents were obtainable from one or more of the parties to the arbitration proceeding in question;

(3) whether Security Life and Congress Life had to obtain testimony from Transamerica or whether such testimony was obtainable from one or more of the parties to the arbitration proceeding in question;

(4) whether the umpire's subpoena was issued in compliance with the procedural requirements of Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7; and

(5) whether the arbitration panel had made a determination as to the materiality and relevance of the documents and testimony sought by Security Life and Congress Life before the umpire's subpoena was issued.

Most importantly, however, is the fact that in rejecting Transamerica's argument that Transamerica was entitled to a trial within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure before Transamerica could be held in contempt for not having complied with the district court's subpoena, the court of appeals ignored its own precedent. Specifically, the court of appeals in *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492 (9th Cir. 1983), a case, like this case, involving a contempt order against a nonparty to a civil action for failure to comply with a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure, stated the following:

> In this circuit a civil contempt proceeding is "a trial within the meaning of Fed. R. Civ. P. 43(a) rather than a hearing on a motion within the meaning of Fed. R. Civ. P. 43(e)[;] ... the issues may not be tried on the basis of affidavits." *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1277 (9th Cir. 1976).

Pennwalt, 708 F.2d at 495. Because the alleged contemnor in *Pennwalt*, like Transamerica in this case, was never afforded a trial within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure, the court of appeals reversed the district court's contempt order. The opinion of the court of appeals in this case, therefore, is in complete conflict with *Pennwalt*.

Transamerica was entitled to proceed, as it did, in response to the district court's subpoena, based on *Pennwalt*. *Pennwalt* was a published decision in the Ninth Circuit on which Transamerica could reasonably rely. Therefore, before Transamerica could be held in contempt for failure to comply with the district court's subpoena, Transamerica was entitled to a trial within the meaning of Rule 43(a) of the Federal

Rules of Civil Procedure. Transamerica was held in contempt without any such trial. Transamerica was, therefore, deprived of due process of law to which Transamerica is entitled pursuant to the Fifth Amendment. *Marshall v. Kleppe*, 637 F.2d 1217, 1221 (9th Cir. 1980).

Moreover, in *Pennwalt*, the court of appeals held that pursuant to Rule 45(e) of the Federal Rules of Civil Procedure, a contempt citation is the only sanction available against a nonparty witness for failure to comply with a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure. There is no authority for an award of monetary sanctions against a nonparty witness for failure to comply with a subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure. *Pennwalt*, 708 F.2d at 494. The district court's order in this appeal assessed monetary sanctions against Transamerica. As a nonparty to any district court civil action, the district court could not have assessed monetary sanctions against Transamerica.

In its opinion, the court of appeals cites *Ayers* for the proposition that the court of appeals could not question the validity of the district court's subpoena. Rule 81(a)(3) of the Federal Rules of Civil Procedure explicitly provides that the Federal Rules of Civil Procedure apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an agency of the United States, such as the IRS in *Ayers*. Therefore, in *Ayers*, there was no question as to whether a subpoena *could* have been issued. In this case, given the explicit provisions of Rule 81(a)(3) of the Federal Rules of Civil Procedure, the issue of whether the district court's subpoena *could* have been issued was *precisely* an issue before the court of appeals.

Transamerica presented a number of arguments to the district court to support Transamerica's contention that a subpoena pursuant to Rule 45 of the Federal Rules of Civil

Procedure can not be issued to obtain evidence for an arbitration proceeding subject to the Federal Arbitration Act and, therefore, that Transamerica was not obligated to comply with the district court's subpoena. The district court refused to consider those arguments. Those arguments involve a number of questions of law including questions of the proper interpretation of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, and questions of the proper interpretation of Rules 45 and 81(a)(3) of the Federal Rules of Civil Procedure. Transamerica presented those same arguments and questions of law to the court of appeals.

The court of appeals is obligated to review questions of law de novo. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). The court of appeals is obligated to review a district court's interpretation of federal statutes de novo. *Id.* The court of appeals is obligated to review a district court's interpretation of federal rules de novo. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500 (9th Cir. 1994). More specifically, the court of appeals is obligated to review a district court's interpretation of the Federal Rules of Civil Procedure de novo. *The Atchison, Topeka and Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1073 (9th Cir. 1998). If a mixed question of law and fact requires the court of appeals to consider legal concepts and to exercise judgment about the values that animate legal principles, then the question should be classified as one of law and reviewed de novo. *Tolbert v. Page*, 183 F.3d 677, 682 (9th Cir. 1999). Therefore, the court of appeals was obligated to conduct a de novo review of the questions of law presented by Transamerica concerning the proper interpretation of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, and the proper interpretation of Rules 45 and 81(a)(3) of the Federal Rules of Civil Procedure. The failure of the court of appeals to make this required de novo review deprived Transamerica of due process of law. Most importantly, the refusal of the

court of appeals to address the question of whether a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure can be issued to obtain evidence for an arbitration proceeding subject to the Federal Arbitration Act deprived Transamerica of due process of law. It is tautological that Transamerica should not have be held in contempt for failing to comply with the district court's subpoena if the district court's subpoena could not and, therefore, should not have been issued.

Assuming, arguendo, that Rule 45 of the Federal Rules of Civil Procedure does apply to arbitration proceedings subject to the Federal Arbitration Act, the express provisions of Rule 45 of the Federal Rule of Civil Procedure precluded Transamerica from being held in contempt in this case. On July 19, 1999, after being served with the district court's subpoena, Transamerica wrote to counsel for Security Life and Congress Life stating its continuing objections to the attempts of Security Life and Congress Life to obtain documents from Transamerica. Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure provides as follows:

> (B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. ***If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued.*** If objection has been made, the party serving the subpoena may, upon notice

> to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

Fed. R. Civ. P. 45(c)(2)(B) (emphasis added). Accordingly, pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure, Security Life and Congress Life were not entitled to inspect and copy any documents that were within the scope of the district court's subpoena except pursuant to an order of the district court. In order to obtain such an order Security Life and Congress Life should have, as provided by Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure, moved for an order of the district court compelling such production. Security Life and Congress Life never brought such a motion. Therefore, Transamerica was not obligated to produce documents pursuant to the district court's subpoena. It was contrary to the explicit provisions of Rule 45 of the Federal Rules of Civil Procedure, therefore, to hold Transamerica in contempt for failing to comply with the district court's subpoena and produce documents when the district court had not issued an order pursuant to Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure compelling Transamerica to produce such documents. *Pennwalt*, 708 F.2d at 494. This error of law of the district court constitutes an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1966) ("A district court by definition abuses its discretion when it makes an error of law.")

The district court's subpoena sought: (1) documents with respect to Transamerica's reinsurance business; and (2) the testimony from the employee of Transamerica who was most knowledgeable with respect to certain matters specified in the subpoena, all of which matters concern the reinsurance business of Transamerica. The reinsurance business

operations of Transamerica are, and have been for a number of years, located in Charlotte, North Carolina.

Any documents which were within the scope of the district court's subpoena would be located in Charlotte, North Carolina. The only employees of Transamerica who had any knowledge with respect to the matters specified in the district court's subpoena resided and worked in Transamerica's reinsurance offices in Charlotte, North Carolina. Rule 45(e) of the Federal Rules of Civil Procedure provides that adequate cause for failure to obey a subpoena exists when a subpoena purports to require a nonparty to a civil action to attend a deposition or produce documents at a place that is beyond the territorial limits set forth in Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure. When a corporation that is not a party to an action is served with a subpoena in the action and that subpoena requires the corporation to designate one or more officers, directors, managing agents or other persons to testify on behalf of the corporation, the limits provided by Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure are applied to the individual human being, or individual human beings, as the case may be, who are designated by the corporation. *Price Waterhouse LLP v. First Am. Corp.*, 182 F.R.D. 56, 62 (S.D.N.Y. 1998).

Transamerica is not a party to any civil action in the district court under which the district court's subpoena was issued. Transamerica is also not a party to the arbitration proceeding under which the umpire's subpoena was issued. Given the fact that the only persons who could be designated by Transamerica to appear and testify as commanded by the district court's subpoena were employed in Charlotte, North Carolina, the district court's subpoena which commanded Transamerica to produce a witness and documents in California, in fact, commanded Transamerica to produce a witness and documents beyond the territorial limits provided by Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil

Procedure. It was contrary to the explicit provisions of Rule 45 of the Federal Rules of Civil Procedure for the district court to hold Transamerica in contempt for failing to produce a witness beyond the territorial limits set forth in Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure. Rule 45(e) of the Federal Rules of Civil Procedure provides that such failure is due to adequate cause and that such adequate cause precludes Transamerica from being held in contempt. This error of law of the district court constitutes an abuse of discretion. *Koon*, 518 U.S. at 100.

CONCLUSION

A subpoena can not be issued pursuant to Rule 45 of the Federal Rules of Civil Procedure to compel a nonparty to an arbitration proceeding subject to the Federal Arbitration Act to produce documents and a witness in that arbitration proceeding. The only way in which a nonparty to an arbitration proceeding can be commanded to produce documents and a witness in an arbitration proceeding subject to the Federal Arbitration Act is by a subpoena issued pursuant to section 7 of the Federal Arbitration Act, 9 U.S.C. § 7. A subpoena issued pursuant to section 7 of the Federal Arbitration Act, 9 U.S.C. § 7, must compel a witness to appear before one or more of the arbitrators. Transamerica was never served with any subpoena that meets the requirements of section 7 of the Federal Arbitration Act, 9 U.S.C. § 7. Therefore, Transamerica was not obligated to produce documents and a witness as commanded in the district court's subpoena.

Moreover, Transamerica was entitled to a trial within the meaning of Rule 43(a) of the Federal Rules of Civil Procedure before it could be held in contempt for failure to comply with the district court's subpoena. Transamerica was held in contempt without any such trial and contrary to the explicit provisions of Rule 45 of the Federal Rules of Civil Procedure.

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

REID A. EVERS
STEVEN D. WEINBERG*
TRANSAMERICA OCCIDENTAL LIFE
INSURANCE COMPANY LAW DEPARTMENT
Attorneys for Petitioner
1150 South Olive, 21st Floor
Los Angeles, California 90015
(213) 742-3595

* *Counsel of Record*

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MAY 23, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56811
D.C. No. CV-99-08726-HLH

SECURITY LIFE INSURANCE COMPANY OF AMERICA; CONGRESS LIFE INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

DUNCANSON & HOLT, INC. CLAIMS SERVICE INTERNATIONAL, INC.; THE MULTIPLE EMPLOYERS TRUST QUOTA SHARE LINE SLIP,

Defendants,

and

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent-Appellant.

MEMORANDUM*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California, Los Angeles
Harry L. Hupp, District Judge, Presiding

Argued and Submitted May 8, 2001
Pasadena, California

Before: MAGILL**, McKEOWN and FISHER, Circuit Judges.

Transamerica appeals the district court's order imposing sanctions for its failure to comply with a subpoena for documents and testimony of a corporate witness. A district court's civil contempt order is reviewed for abuse of discretion, as is a decision to impose sanctions or punishment for contempt. *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995).

Transamerica argues that the district court abused its discretion because it held Transamerica in contempt for refusing to comply with an erroneous order and invalid subpoena. We may not, however, review the legal or factual basis of the underlying subpoena, or the arbitration or discovery process in district court in Minnesota. *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) (" 'The only issue open to [the contemnor] in defending the contempt proceeding [is] to show inability to then produce' " the documents sought in the summons) (quoting *United States v. Rylander*, 460 U.S. 752, 756-57 (1983)).

** Honorable Frank J. Magill, Senior United States Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

Appendix A

Given the timing and substance of Transamerica's purported objections lodged via letter, we conclude that the district court did not abuse its discretion in determining that Transamerica was not relieved of its obligation to comply with the California subpoena. *See* Fed. R. Civ. P. 45(c)(2)(B) and (e); 30(b)(6). Rule 30(b)(6) and Rule 45 do not allow a corporate entity to avoid compliance with a subpoena by announcing — after it has refused to appear, and the deposition date has passed — that the employee it had designated for the deposition is outside the territorial limits of the subpoena.

Transamerica also contends that the district court held it in contempt without due process of law because the contempt order was issued without the benefit of a full trial under Fed. R. Civ. P. 43(a). We review de novo. *Thomas, Head and Greisen Employees Trust v. Buster*, 95 F.3d 1449, 1458 (9th Cir. 1996).

Without an issue of material fact, the district court was required only to give notice and allow an opportunity for the parties to be heard. *See Ayres*, 166 F.3d at 995 ("This circuit has repeatedly held ... that finding a party in civil contempt without a full-blown evidentiary hearing does not deny due process of law to a contemnor."); *cf. F.J. Hanshaw Enters., Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1138 (9th Cir. 2001) (distinguishing between process due for civil and criminal contempt). Because the district court provided adequate notice and hearing, no due process violation occurred.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED SEPTEMBER 10, 1999 AND ENTERED SEPTEMBER 15, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV 99-8726 HLH

Title Security Life Ins. Co. v. Duncanson & Holt, Inc.

Date Sept. 10, 1999

DOCKET ENTRY

FILED SEP 10 1999

ENTERED SEP 15 1999

PRESENT

HON. HARRY L. HUPP, JUDGE

Maynor R. Galvez	**Cynthia L. Mizell**
Deputy Clerk	Court Recorder

* * *

PROCEEDINGS: Motion to hold defendants in contempt for failure to comply with subpoena.

Appendix B

ORDER (also, if applicable, findings and memorandum opinion):

The motion of petitioner Security Life Insurance Company of America (hereafter SLIC) to hold respondent Transamerica Occidental Life Insurance Company (hereafter TOLIC) in contempt of court for failure to obey the subpoena duces tecum issued by this court on 7/13/99 and properly served on TOLIC is granted. The court finds that TOLIC is in contempt of court.

In addition to the sanctions imposed below, the court reserves jurisdiction to impose further sanctions, including a daily fine, if non-compliance continues.

Normally, while non-compliance with a subpoena may be treated as a contempt, the usual practice is to obtain an order to comply before proceeding with coercive orders in a contempt proceeding. However, in this case, the matter has already been fully briefed, argued, and decided in the District of Minnesota. Thus, the court may and will proceed straight to the enforcement of the subpoena. In this matter, which is merely ancillary to the proceedings in the District of Minnesota (number cv 99-0799 DWF in that court), the bona fides of the subpoena were fully litigated and decided by a hearing before Magistrate Judge Boylan of the District of Minnesota and affirmed by District Judge Frank of that district. Counsel inform the court that TOLIC filed an appeal on 9/3/99 to the Eighth Circuit from Judge Frank's decision, but there is no indication that a stay order has been issued by either the district or circuit court, or, for that matter, that one has been sought.

Appendix B

The facts as presented in the papers on this motion are not in dispute and the matter is purely one of law. SLIC has filed an arbitration proceeding in Minnesota against a group of reinsurers who joined in a reinsurance contract. The contract of reinsurance has an arbitration clause. All reinsurers were bound on the contract by the same agent (Duncanson & Holt) who purported to act for all of them. The reinsurers other than TOLIC are participating in the arbitration, set for hearing on Oct. 12 of this year. TOLIC acknowledges that it is a reinsurer under the contract and that it is required to arbitrate. However, TOLIC has refused to participate in the pending arbitration proceeding on the claimed dual grounds that it is entitled to an arbitration separate from the one involving its co-reinsurers and that the monetary claims of SLIC are for items not covered by the reinsurance contract. An arbitration subpoena calling for the production of various documents was served on TOLIC, who refused to comply. A motion to enforce the subpoena was heard in the District of Minnesota by Magistrate Judge Boylan and was resisted by TOLIC. On July 1, 1999, Judge Boylan ordered that the motion to compel compliance with the subpoena was granted. On Aug. 6, 1999, District Judge Frank affirmed the decision of the Magistrate Judge. Further facts are stated in the memorandum of Judge Boylan and are incorporated by this reference from his memorandum.

Among other things, Judge Boylan recognized that enforcement of a subpoena had to be done in the district where the appearance was required (FRCP 45(a)(2)), and thus ordered that a subpoena be sought from this district. Under FRCP 45, this is the court to enforce the subpoena. That was done, served on TOLIC, who has refused to comply, and such is the subject of this motion proceeding.

Appendix B

TOLIC raises much the same arguments that it raised in the proceedings before Magistrate Judge Boylan and District Judge Frank. This court will not entertain those arguments since they are now ruled upon and final. Thus, there is not considered the argument that a prehearing subpoena could not be served on a non-party to the arbitration. This position was rejected because a third party witness subpoena was available even if TOLIC was not a party to the arbitration. The argument that the policy did not cover the claims made by SLIC was rejected because that was precisely the issue to be arbitrated. The argument that for a deposition in Los Angeles, a subpoena would have to be issued by this court was agreed to, leading to the issuance of the subpoena at issue in this case. Materiality arguments were rejected by the Magistrate Judge. Further, it is argued here that contempt may not be sought until a production order is made. However, this court concludes that the orders made in Minnesota were the production order.

The only argument made here but not in Minnesota is that the person who knows the most about reinsurance is located in North Carolina and not within the 100 mile subpoena range (FRCP 45(c)(3)(A)(ii)). However, in the Minnesota proceedings, TOLIC argued that the place of the deposition had to be where its office was located and that such was Los Angeles. As a result, it argued that the subpoena had to be issued in the Central District. The Magistrate Judge agreed and directed SLIC to proceed in that manner. The court is not going to play "which shell is the pea under" in this respect. Having argued for Los Angeles, TOLIC will have to accept Los Angeles.

Appendix B

The failure to appear for the deposition was deliberate and the failure was made after full notice. No attempt was made to quash the subpoena. The failure to appear is found to be a contempt of court. The following orders are made at this time with reservation of jurisdiction to make more orders later: 1. TOLIC is ordered to appear at the offices of SLIC's attorney Norman A. Dupont at 9:00 AM, on Sept. 13, 1999, with the documents listed in the subpoena duces tecum and then and there submit to the taking of its deposition and the production of the subpoenaed documents. 2. TOLIC shall pay to SLIC the costs of this proceeding which are fixed at $10,000 attorney's fees and $503.35 costs, payable forthwith. The court reserves jurisdiction to award more fees and costs if further enforcement proceedings are necessary.

In addition, the court reserves jurisdiction to order further sanctions, including imprisonment pending compliance and a daily fine until compliance if further proceedings are necessary to enforce the orders of the Minnesota court and the subpoena issued here. For this purpose, a further hearing is scheduled for Tuesday, Sept. 14, at 9 AM, to determine if there has been compliance with the order and whether further steps are necessary. Counsel are ordered to be present unless the court is jointly informed by both counsel that there has been compliance and no further steps are necessary.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56811
D.C. No. CV-99-08726-HLH

SECURITY LIFE INSURANCE COMPANY OF AMERICA; CONGRESS LIFE INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

DUNCANSON & HOLT, INC. CLAIMS SERVICE INTERNATIONAL, INC.; THE MULTIPLE EMPLOYERS TRUST QUOTA SHARE LINE SLIP,

Defendants,

and

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Respondent-Appellant.

ORDER

Appendix C

Before: MAGILL*, McKEOWN and FISHER, Circuit Judges.

The panel has unanimously voted to deny appellee's petition for rehearing. The petition is DENIED.

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*Honorable Frank J. Magill, Senior United States Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

Supreme Court, U.S.
FILED
JAN 7 2002
CLERK

(3)

No. 01-737

In The

Supreme Court of the United States

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

SECURITY LIFE INSURANCE COMPANY OF AMERICA and CONGRESS LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

REID A. EVERS
Counsel of Record
STEVEN D. WEINBERG
TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY LAW DEPARTMENT
1150 South Olive, 21st Floor
Los Angeles, California 90015
(213) 742-3595

Attorneys for Petitioner Transamerica Occidental Life Insurance Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Spp

REASONS QUESTIONS PRESENTED ARE PROPER

In commenting on the questions presented by Petitioner Transamerica Occidental Life Insurance Company ("Transamerica'), Respondents have failed to distinguish between the subpoena issued by the Clerk of the United States District Court for the Central District of California ("district court's subpoena") and the subpoena issued by the umpire of the arbitration panel sitting in Minnesota ("umpire's subpoena"). In *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000), the decision cited by Respondents, the Eighth Circuit only addressed issues with respect to the umpire's subpoena. Moreover, the Eighth Circuit only addressed the demand for the production of documents in the umpire's subpoena. The Eighth Circuit did not address any issues with respect to the district court's subpoena, nor did the Eighth Circuit address the issue of the demand for the testimony of a witness designated by Transamerica. With respect to the issue before the Ninth Circuit of whether it was proper for the district court's subpoena to have been issued compelling the testimony of a witness designated by Transamerica, the Eighth Circuit stated the following: *"This is a thorny question indeed,* presenting what may be a serious problem in the enforcement of witness subpoenas under the [Federal Arbitration Act]. . . . [W]e express no opinion about *the unusual procedure followed by the district court* for the enforcement of the panel's subpoena of Transamerica's employee." (Emphasis added.) *Id.* at 872.

It is important to note that Transamerica was never held in contempt pursuant to the contempt provisions contained in section 7 of the Federal Arbitration Act, 9

U.S.C. § 7, for failing to comply with the umpire's subpoena. Transamerica was held in contempt pursuant to the contempt provisions contained in Rule 45 of the Federal Rules of Civil Procedure for failure to comply with the district court's subpoena.

Contrary to the assertions of Respondents, the first three questions presented by Transamerica were clearly raised in Transamerica's Opening Brief filed in the Ninth Circuit. The first question presented was raised in Arguments D.3. and D.5.a. in Transamerica's Opening Brief. The second question presented was raised in Argument A. in Transamerica's Opening Brief. The third question presented was raised in Argument B. in Transamerica's Opening Brief.

Transamerica was clearly appealing the monetary sanctions assessed by the district court. Accordingly, the seventh question presented by Transamerica was clearly an issue before the Ninth Circuit.

With respect to the fifth question presented by Transamerica, Respondents assert that Transamerica had not properly objected to the demand for the production of documents in the district court's subpoena because Transamerica had not filed those objections with the district court. There is no basis for this assertion. Rule 5(d) of the Federal Rules of Civil Procedure provides, in part: "All papers *after the complaint* required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service. . . ." (Emphasis added.) There was never a complaint filed in

the district court. Indeed, on July 19, 1999, when Transamerica served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica, there was no action whatsoever that had been filed in the district court in which Transamerica could have filed those objections. An action was not commenced in the district court until August 27, 1999, more than a month after Transamerica had served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica. Moreover, assuming, arguendo, that there was an action in existence in the district court when Transamerica served Respondents with its continuing objections to the attempts of Respondents to obtain documents from Transamerica, Local Rule 8.3(f) of the district court provides that such objections should not be filed.

Respondents assert that the sixth question presented by Transamerica is based on an "inaccurate rendition of the facts." The uncontroverted facts in this case are that the documents and witness in question were located in Charlotte, North Carolina. Given the distance between Los Angeles, California and Charlotte, North Carolina, the application of the territorial limits set forth in Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure is a proper question in this case.

In commenting on the fourth question presented by Transamerica, Respondents ignore the authority cited on page 19 of Transamerica's Petition for a Writ of Certiorari. Moreover, Respondents dismiss, without any basis, the examples of disputed material facts in this case delineated on page 18 of Transamerica's Petition for a Writ of Certiorari. The issue of contempt was never before the

Eighth Circuit. Moreover, the Eighth Circuit never addressed any issue relating to the district court's subpoena. Therefore, the disputed material facts raised by Transamerica were never addressed by the Eighth Circuit either in the context of the issue of contempt or in the context of the district court's subpoena. Contrary to the assertions of Respondents, there is nothing frivolous about the fourth question presented by Transamerica.

CONCLUSION

Each of the questions presented by Transamerica are proper questions for this Court to consider. Moreover, they are important questions for this Court to consider because they deal with the extent and limits of the subpoena power that is available in arbitration proceedings subject to the Federal Arbitration Act. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

REID A. EVERS
STEVEN D. WEINBERG
TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY LAW DEPARTMENT
1150 South Olive
Los Angeles, CA 90015
(213) 742-3595
Attorneys for Petitioner